

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CONTRELL LATTIMORE,

Defendant-Appellant.

UNPUBLISHED

December 27, 2011

No. 298155

Wayne Circuit Court

LC No. 09-029212-FC

Before: SHAPIRO, P.J., and WHITBECK and GLEICHER, JJ.

PER CURIAM.

Defendant Contrell Lattimore was convicted by a jury of assault with intent to commit murder, MCL 750.83, and unlawful imprisonment, MCL 750.349b, in connection with the savage beating of Caurice Burse. On appeal, defendant raises several challenges to defense counsel's performance at trial. Defendant has not shown that counsel's defensive strategy was so unreasonable that he was deprived of his right to counsel. On the contrary, counsel more than competently formulated a defense strategy in the face of the victim's express identification of defendant as his assailant and powerful circumstantial evidence suggesting defendant's guilt. Accordingly, we affirm defendant's convictions and sentences.

I. BACKGROUND

On the night of November 9, 2009, Eddie Smith and his girlfriend "Courtney" picked up Burse and drove to an East Detroit home to purchase marijuana. The trio then travelled to a gas station to make additional purchases. While Burse waited in the vehicle's backseat, two men approached and entered the backseat from either side. Burse identified one man as defendant. Although a police report made while Burse was hospitalized identifies the second man as "Dre," Burse testified that he did not know the other assailant's identity. Burse theorized that the investigating officer misinterpreted his references to the plural attackers as "they." The two men used a Taser to shock Burse into submission.

Smith and Courtney returned to the vehicle and drove to a house on Broadstreet Avenue in Detroit. Defendant admits that his "family" owns the Broadstreet house and he used it to spend time with friends, drinking alcohol and smoking marijuana. Burse testified that he had even visited defendant at that location in the past. Burse further testified that defendant and the unidentified man pulled him from the car and threw him to the ground in front of the Broadstreet

house. Defendant, Smith and the third assailant shocked Burse several more times with the Taser, kicked and punched him, and hit him three times in the head with a baseball bat.

The men then dragged Burse to the house and threw him down a flight of stairs into the unlit basement. The men continued to kick Burse and hit him with a baseball bat. Smith told defendant that he wanted to cut Burse's throat and left to retrieve a knife. Burse began to struggle and was able to bite defendant's finger, drawing blood. When Smith returned, he bound Burse's ankles and wrists with duct tape and covered his mouth. Smith then stabbed Burse in the shoulder and began to cut across Burse's neck. Burse saved himself by feigning death.

Once defendant, Smith and the unidentified third man left, Burse loosened the duct tape, broke a basement window, climbed out and escaped to a nearby vacant lot. Someone summoned an ambulance and police. Although Burse was in and out of consciousness, he was able to name defendant and Smith as his assailants. When officers questioned defendant the following day, they noticed that his finger was badly injured. Defendant claimed to have been bitten by a dog. The officers transported defendant to the hospital but the treating physician could not determine whether the bite mark was made by a human or a dog. Based on this evidence, the jury convicted defendant of assault with intent to murder and unlawful imprisonment. The court sentenced defendant as a fourth habitual offender, MCL 769.12, to 22 to 35 years for the assault conviction and 10 to 15 years for the unlawful imprisonment conviction.

II. STANDARD OF REVIEW

On appeal, defendant argues that his trial counsel performed ineffectively by making several strategic decisions that prejudiced his trial. Defendant contends that trial counsel should have (1) filed a motion to suppress evidence obtained during an illegal search of the Broadstreet house, (2) obtained a bite mark expert, (3) investigated or produced *res gestae* witnesses, (4) refrained from eliciting testimony regarding defendant's and a defense witness's criminal records, and (5) objected to the admission of prejudicial evidence at trial. Defendant filed a motion for a new trial in the lower court. The court held a *Ginther*¹ hearing at which defendant made a record regarding his claims. The trial court determined that defense counsel was not constitutionally ineffective and that none of the claimed errors would have been outcome determinative. Accordingly, the court denied defendant's motion for a new trial.

An ineffective assistance claim "is a mixed question of fact and constitutional law. A judge must first find the facts, then must decide whether those facts establish a violation of the defendant's constitutional right to the effective assistance of counsel." *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). We review the trial court's factual findings for clear error and constitutional determinations de novo. *Id.* at 484-485. To establish that counsel was ineffective, a defendant must show that counsel's performance was so deficient that it deprived him of the right to counsel. We must presume that counsel employed sound trial strategy and the defendant is required to show "that, but for counsel's error, the result of the proceeding would have been different." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). This Court

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

does not substitute its judgment for that of counsel regarding strategic matters, nor does it assess counsel's performance with the benefit of hindsight. *People v Petri*, 279 Mich App 407, 411; 760 NW2d 882 (2008).

III. ANALYSIS

A. Motion to Suppress

When the responding officers arrived on the scene, Burse told them that he was attacked in the basement of "a yellow house directly across the field." The officers immediately entered the house without a warrant. The officers went to the basement where they found a baseball bat, duct tape and various items later identified as belonging to Burse. Defendant argues that defense counsel should have filed a motion to suppress this evidence. At the *Ginther* hearing, defense counsel explained her decision to abstain:

[I]n every case you have to have a strategy and you have to deal with the facts that are inescapable

* * *

[I]t wasn't part of my strategy [] to say that the guy didn't get beaten up. . . . Clearly it happened

* * *

[T]hat way if I admit the things that are given then [the jury] might believe the other things that I'm trying to get them to believe.

It is a reasonable strategy for defense counsel to concede the indisputable evidence and attempt to establish her client's innocence or lesser culpability. See, e.g., *People v Matuszak*, 263 Mich App 42, 60-61; 687 NW2d 342 (2004) (holding that counsel is not ineffective when he concedes guilt based on undisputed evidence and instead tries to establish a defense or mitigating factors). Moreover, it is well established that counsel is not ineffective simply because the chosen defense strategy proves unsuccessful. *Id.* at 61; *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

Counsel's strategy was to concede the obvious fact that someone assaulted Burse on November 9 at the Broadstreet house. The baseball bat, duct tape and other items found were covered in Burse's blood and were clearly used in or present during the attack. Rather than denying the obvious, counsel focused on her theory that Burse either unintentionally or purposefully misidentified defendant as his assailant. The items used to effectuate the attack simply did not negate the defense theory. Accordingly, counsel had no reason to suppress the introduction of this evidence.

In any event, we agree with the trial court's conclusion that a motion to suppress would have lacked legal support. Counsel is not ineffective for failing to raise futile or meritless motions or objections. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003); *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (2003). Had defense counsel argued the

illegality of the search, the prosecution would have easily demonstrated that exigent circumstances necessitated the initial warrantless entry. The police need not obtain a warrant in emergency situations where they have “probable cause [to believe] that the premises to be searched contains” the suspected “perpetrators of a crime.” *People v Davis*, 442 Mich 1, 24; 497 NW2d 910 (1993).

The responding officers found a severely injured victim of a brutal beating. The victim directed the officers to the nearby location of his attack. Given the proximity of time and place, the officers reasonably believed that the suspects might still be in the house. The officers reasonably found exigent circumstances to immediately enter the house to seek out and secure violent criminals. Once inside, the condition of the property led the officers to believe that the sparsely furnished house had been abandoned. In fact, defendant testified that he was in the demolition process, preparing to remodel the home for sale. The house had electricity only through an illegal connection. Further, the basement had no functioning lights and the officers conducted their investigation by flashlight.

The Fourth Amendment prohibition of unreasonable searches and seizures protects people, not places. *People v Taylor*, 253 Mich App 399, 404; 655 NW2d 291 (2002). A search may only be categorized as unreasonable if the claimant has a “reasonable, or justifiable, expectation of privacy” in the property. *Id.* Yet, a person cannot maintain a reasonable expectation of privacy in abandoned property. *Id.* at 406. The defendant claiming a privacy interest bears the burden of showing that the property was not abandoned. *Id.*²

Defendant had keys to the house, which belonged to his nursing home-bound aunt, and he admittedly used the house to congregate with friends to drink alcohol and smoke marijuana. The home was in poor condition, inside and out. Given the state of interior demolition, the officers likely suspected that it had been vandalized to recover valuable scrap. The house lacked basic furniture and appliances and was powered through an illegal electrical connection. This was sufficient for the officers to reasonably believe that the house was abandoned and that a search warrant was not necessary.

² *Taylor*, 253 Mich App at 407, provides a nonexhaustive list of factors to be considered in determining whether property appears abandoned:

With respect to abandoned or vacant structures, objective factors pertinent to the totality of the circumstances inquiry must be evaluated. Case by case, these factors will become relevant to determine whether police officers must secure a warrant before entering: (1) the outward appearance, (2) the overall condition, (3) the state of the vegetation on the premises, (4) barriers erected and securely fastened in all openings, (5) indications that the home is not being independently serviced with gas or electricity, (6) the lack of appliances, furniture, or other furnishings typically found in a dwelling house, (7) the length of time that it takes for temporary barriers to be replaced with functional doors and windows, (8) the history surrounding the premises and prior use, and (9) complaints of illicit activity occurring in the structure.

B. *Res Gestae* Witnesses

Defendant challenges counsel's failure to interview four *res gestae* witnesses before deciding not to call them at trial. Specifically, defendant argues that defense counsel should have presented testimony from his alleged coconspirator, Smith, as well as Smith's girlfriend who was in the car when the attack began. Defendant also points to the testimony of defense witness Leander Mann that two men named "Tae" and "Dre" were the true culprits. Defendant contends that counsel should have located and interviewed these individuals to uncover exculpatory evidence.

The decision to call and investigate witnesses falls within the realm of trial strategy. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). The failure to call witnesses constitutes ineffective assistance only if it deprives the defendant of a substantial defense. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). A "substantial defense" is one that "might have made a difference in the outcome of the trial." *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996).

We note that defendant has not provided affidavits from his four proffered witnesses to describe their potential testimony, nor did he present them as witnesses at the *Ginther* hearing. Defendant did not even speculate regarding their potential testimony when appearing at the hearing. Defendant's challenge must fail as a matter of course as he failed to make the record necessary for our review. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). In any event, we note that Smith and defendant were originally scheduled to be tried in one proceeding but before separate juries. Smith entered a plea agreement less than a week before trial on the charge of assault with intent to murder. Defendant failed to ask trial counsel at the *Ginther* hearing to explain why she chose not to present Smith as a defense witness. From the record, we can only assume that Smith's testimony would have been unfavorable.

Defense counsel indicated that she did not search for Courtney during her investigation because she felt Courtney's testimony would be "unhelpful." Based on the record, the extent of our knowledge is that Courtney was in the vehicle when the attack began. We have no reason to doubt counsel's determination that Courtney likely would not exonerate defendant.

Defense witness Leander Mann testified that he came into contact with defendant on the evening of November 9, after defendant had been bitten by a dog. Defendant told Mann that he had socialized at the Broadstreet house earlier that night with Smith and Burse. Defendant needed to return to ask Smith and Burse to leave and then lock up. Mann drove defendant to the Broadstreet house. When the pair entered the house, they heard a commotion in the basement and discovered "Tae," "Dre" and Smith physically assaulting Burse. Defendant identified "Dre" as a man named "Andre" and "Tae" as a man who lived near his grandmother's residence. At the *Ginther* hearing, counsel stated that the prosecution did not believe "Tae" and "Dre" existed. Counsel implied that she agreed with that assessment and so did not attempt to locate them.

It appears from the record that defendant may have shared the contents of his discovery packet with Mann before trial and that Mann "hung his hat" on the references to "Dre" in Burse's police report. Ultimately, we agree that there is no indication that the proposed witnesses exist, let alone would be willing to throw themselves on a sword to save defendant.

C. Bite Mark Expert

Following defendant's arrest, officers transported him to the hospital for treatment of the bite wound on his finger. Defendant claimed that he had been walking his dog when two stray dogs attacked. He asserted that he tried to push one dog away and was bitten in the process. The treating physician, Dr. Siddharth Mushrif, could not determine whether the bite mark was caused by a dog, as alleged by defendant, or a human, as alleged by Burse. Dr. Mushrif testified that he could only be 100-percent certain of a bite source if he saw the bite as it happened or if a credible witness identified the source. At trial, defense counsel highlighted the doctor's inconclusive testimony and argued that it raised a reasonable doubt regarding defendant's guilt.

At the *Ginther* hearing, counsel explained that she did not seek out a bite mark expert because the existing evidence was useful to the defense. After examining "the finger in it's [sic] freshly bitten state" the doctor was unable to discern the source. Defense counsel expressed her concern with more deeply analyzing the bite mark and thereby drawing greater attention to the fact that Burse, although dazed and confused at the time, told the officers that he bit defendant's finger. Defense counsel doubted Burse's ability to quickly fabricate that detail given his physical state. Further, by the time defense counsel was retained and began investigating the case, defendant's wound had begun to heal. This weakened any chance of an expert being able to examine the wound and definitely cite its source. Defense counsel further feared that the use of expert testimony could backfire. The defense would be obligated to share the expert's report with the prosecution. If the expert determined that the bite was caused by a human, defendant would have had no chance to exonerate himself.

The decision whether to present expert testimony is a matter of trial strategy squarely within trial counsel's discretion. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). As with any other witness, counsel's failure to retain an expert only amounts to ineffective assistance if defendant is deprived of a substantial defense. *Payne*, 285 Mich App at 190. Given the unlikelihood of finding any expert that could definitively state from unclear emergency room photographs or an exam of defendant's healing hand that the bite was caused by a dog, defendant was not deprived of a substantial defense.

D. Elicitation of Defendant's and Mann's Prior Criminal History

Upon placing defendant on the witness stand, defense counsel stated, "[J]ust to get this out of the way . . . didn't you have some criminal cases against you . . . [i]nvolving theft or dishonesty?" Defendant contends that counsel diminished his credibility by eliciting this testimony. Decisions concerning what evidence to present are matters of trial strategy, which we do not review with the benefit of hindsight. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). It "may be sound trial strategy" for criminal defense attorneys to question their clients regarding their criminal history "to take the 'sting' out of" that evidence. *People v Rodgers*, 248 Mich App 702, 716; 645 NW2d 294 (2001). Defendant chose to take the stand as a witness in his own defense. The prosecution was thereby permitted to impeach his credibility with evidence of his past convictions for crimes involving theft or dishonesty. MRE 609(a). At the time of his jury trial, defendant's last conviction was just short of ten years old and, therefore, was not yet too stale for admission. MRE 609(c). As the prosecution surely would have elicited this evidence on cross-examination, defense counsel's questioning was not prejudicial.

Defendant also challenges defense counsel's decision to question Mann about his current criminal status and past history as a parole absconder. However, these questions were necessary to support a defense theory. Mann did not come forward as a witness until one week before trial. Defendant failed to mention Mann to the investigating officers. Upon counsel's questioning, Mann indicated that he was a parole absconder as of November 9, 2009. Therefore, even if he had known that defendant was arrested, he would not have come forward to exonerate defendant and face imprisonment himself.

Defense counsel had to explain why Mann suddenly decided to come forward. In doing so, counsel had to concede that defendant was "locked up" awaiting the current trial. Burse was in jail awaiting trial in an unrelated matter. Mann testified that he briefly saw defendant during intake, learned of his situation and came forward to set the record straight. There simply is no indication that Mann's criminal history reduced, rather than supported, the credibility of his story.

We also reject defendant's challenge to counsel's reference in opening statement to defendant being "locked up." Counsel argued that Burse transferred his accusation from "Dre" to defendant to avoid further personal danger. "Dre" was a free man who could retaliate against Burse while defendant was "locked up" and posed no immediate threat of harm. Counsel cited valid strategic reasons for entering the challenged evidence and is not ineffective merely because this strategy failed. *Matuszak*, 263 Mich App at 61; *Kevorkian*, 248 Mich App at 414-415.

E. "Prejudicial" Evidence

Defendant challenges defense counsel's failure to object to the admission of his arrest record for the current charges, which included several photographs. The record shows that the report contained defendant's address, a photograph of defendant's injured finger, a photograph of defendant in hand restraints while in the hospital for treatment, and two photographs taken at jail intake. As defense counsel stated, there was nothing clearly objectionable regarding this evidence. The jury was clearly aware, based on the witness testimony, that the police placed defendant under arrest before transporting him to the hospital. Accordingly, defendant's arrest record was not a surprise to him. Even if counsel erroneously refrained from objection, the evidence was not so damning as to control the outcome of the trial.

Affirmed.

/s/ Douglas B. Shapiro
/s/ William C. Whitbeck
/s/ Elizabeth L. Gleicher